IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1154

HELEN A. COHEN,

Petitioner,

vs.

ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation, JAMES J. BROPHY, JOHN T. RETTALIATA, and MAYNARD P. VENEMA,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Far from establishing certainty and correctness in the decision below, respondents' Brief in Opposition underscores the need for certiorari and reversal.

First, in a Brief in Opposition which cites not one single court of appeals decision, respondents ignore the demonstrated conflicts among the Circuits regarding a nexus under 42 U.S.C. § 1983 and the scope of 42 U.S.C. § 1985(3).[1]

Second, in urging that the *Cohen* decision conforms to decisions of this Court under 42 U.S.C. § 1983, respondents insist that there be a nexus between significant state subsidies and private discrimination. This is legally untenable, logically fallacious, and economically impossible.

Third, in contending that *Cohen* correctly applied the permissible scope of 42 U.S.C. § 1985(3), respondents continue to overlook Section 5 of the Fourteenth Amendment. Their "law" is some ten years out of date.

And fourth, in suggesting that civil rights responsibilities be passed onto state courts and federal agencies, respondents disregard the lamentable ineffectiveness of both.

[1] Inter-Circuit conflicts under § 1985(3) have recently received additional attention. *See McLellan v. Mississippi Power & Light Co.*, 526 F. 2d 870, 880, n. 20 (5 Cir. 1976). Estreicher, *Federal Power to Regulate Private Discrimination; The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 450-527 (1974); Roth, *Private Interference with an Individual's Civil Rights: A Redressable Wrong under § 5 of the Fourteenth Amendment?* 51 NOTRE DAME LAWYER 120-40 (1975); Note, *Constitutional Law—Civil Rights—Absent State Involvement, Right of Association Not Protected by 42 U.S.C. § 1985(3)*, 9 U. RICHMOND L. REV. 753-9 (1975).

RESPONDENTS FAIL TO ACKNOWLEDGE INTER-CIRCUIT CONFLICTS

Where the respondents do a real disservice to the Court is in their failure to acknowledge the inter-Circuit conflicts under both § 1983 and § 1985(3). Their Brief in Opposition is perhaps unique in that it fails to cite so much as one court of appeals decision—urging instead that "the decision below is in accord with decisions of this Court."

Rule 19(b) of this Court indicates the appropriateness of review on certiorari "[w]here a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter." Resolving such conflicts "is a prime function of this Court's certiorari jurisdiction," *Bailey v. Weinberger*, 419 U.S. 953 (1974) (dissent from denial of petition).

The *Cohen* court, although endeavoring to distinguish *Weise v. Syracuse University*, 522 F. 2d 397 (2 Cir. 1975), on the facts, recognized the basic conflict between *Weise* and *Cohen* as to the sufficiency of allegations in a complaint brought under § 1983 (App. 11a).

The *Cohen* court likewise candidly recognized that its interpretation of § 1985(3) differs from that of five other Circuits (App. 14a, n. 31; 15a, n. 33; see Petition pp. 12-16).

Yet the respondents' response is silence.

"SIGNIFICANT" STATE AID *IS* STATE ACTION UNDER 42 U.S.C. § 1983

Respondents take issue with our position that the decision below is contrary to *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and to other decisions of this Court. They argue (1) that all factors of state involvement must be weighed under § 1983, (2) that there is no actual conflict, and (3) that *Burton* and other cases hold that where state involvement takes the form of significant aid there must be a nexus between the aid and the discriminatory acts.

We agree with the first point, but certainly not with the second or the third.

With all due respect to the respondents, *Cohen* is irreconcilable with *Burton*. No nexus whatever existed in *Burton* between the state's participation and the discrimination. Had the *Burton* Court required this, Blacks would still be waiting for service outside the Eagle restaurant in the Parking Authority building. Yet the *Cohen* complaint was held insufficient for failing to allege it.

In point of fact, on at least two occasions, this Court has specifically denied the need for demonstrating a nexus between state support and private discrimination to invoke § 1983—even when the involvement is not in the form of a cash subsidy. *See Reitman v. Mulkey*, 387 U.S. 369, 380 (1967) ("the State neither commanded nor expressly authorized the discriminations"); *Gilmore v. City of Montgomery*, 417 U.S. 556, 581 (1974) (Mr. Justice White, concurring: "To violate the Equal Protection Clause the State need not make, advise or authorize the private decision to discriminate that involves the State. . . .").

Respondents then deprecate what they say is a "new rule of law" (Respondent's Brief p. 8)—"whenever 'significant' government aid is provided an employer, its actions are, *ipso facto*, state actions." This *is* the law where discrimination is concerned;[2] once the *Cohen* court concluded that "significant" state support had been alleged, it should have gone no further than to reverse and remand.

"Significant" state aid—beyond "such necessities of life as electricity, water, and police and fire protection," *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972)—furnished to a discriminatory institution is, by definition, "state action". This is what "state action" is all about.

Economically, a "nexus" between significant state subsidies and private discrimination is a meaningless concept. Money is fungible. Once paid into an institution's general fund, it cannot be followed thereafter. Either the state aid inherently—and inevitably—supports the discrimination, or requiring that the aid be traced into the salary checks of the discriminatory perpetrators is sending a plaintiff on a fool's errand. *Norwood v. Harrison*, 413 U.S. 455, 464-465 (1973), held the former: "if the school engages in discriminatory practices the State by tangible aid . . . *thereby* gives support to such discrimination" (emphasis added). The *Cohen* court required the latter.

Finally, respondents profess to see unworkable vagaries in a state action test of "significant" support (Respondent's Brief at p. 7). They apparently have

[2] "[T]here is a peculiar offensiveness when citizens are required to pay taxes 'for purposes whence they or their children are excluded.'" Friendly, J., in *Grafton v. Brooklyn Law School*, 478 F. 2d 1137, 1142, n. 12 (2 Cir. 1973).

overlooked the fact that this Court and the Seventh Circuit have both adopted that test *in haec verba: Norwood v. Harrison*, 413 U.S. at 467 ("A state's constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination."); *Doe v. Bellin Memorial Hospital*, 479 F. 2d 756, 762 (7 Cir. 1973) (" 'We believe that affirmative support must be significant, measured either by its contribution to the effectiveness of defendant's conduct, or perhaps by its defiance of conflicting national policy, to bring the statute [§ 1983] into play.' ")

RESPONDENTS, AND THE COURT BELOW, HAVE OVERLOOKED SECTION 5 OF THE FOURTEENTH AMENDMENT

Respondents' argument regarding the constitutional reach of 42 U.S.C. § 1985(3) is an anomalous one. If their argument fairly summarizes the holding of *Cohen* on the point, the ~~petitioners~~ RESPONDENTS have confessed error below.

Their position briefly stated is that "where the Fourteenth Amendment forms the basis of a private cause of action under § 1985(3), as in the instant case, such Fourteenth Amendment rights may be secured only as against the action of the state" (Respondent's Brief p. 8). In support, they cite six decisions of this Court, the most recent of which are *United States v. Price*, 383 U.S. 787 (1966), and *United States v. Guest*, 383 U.S. 745 (1966).

Unfortunately for the respondents, the law has progressed well beyond *Price* and *Guest*. Indeed, the Opinion of the Court in *Guest* expressly stated that "nothing said in this opinion goes to the question of what kinds of other and broader legislation Congress might

constitutionally enact under § 5 of the Fourteenth Amendment to implement [the Equal Protection] clause" (383 U.S. at 755). In 1973, this Court reaffirmed what was by that time an accepted truism; a statement that the Fourteenth Amendment is applicable only to state conduct was qualified by the caveat that "this is not to say, of course, that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment." *District of Columbia v. Carter*, 409 U.S. 418, 424, n. 8 (1973).

Two months after *Price* and *Guest* this Court decided *Katzenbach v. Morgan*, 384 U.S. 641 (1966), which announced the reawakening of § 5. Section 5 confers on Congress the "same broad powers expressed in the Necessary and Proper Clause" (384 U.S. at 650). It held:

> "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." (384 U.S. at 651)

Of similar effect were *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (enforcement clause of Thirteenth Amendment), and *Oregon v. Mitchell*, 400 U.S. 112 (1970).

Then, when this Court, in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), eliminated the state action requirement of § 1985(3), it invited attention to possible support under § 5 of the Fourteenth Amendment—specifically calling attention to *Katzenbach*, *Oregon*, and the concurring opinions in *Guest* (403 U.S. at 107).

Those decisions in six other Circuits (Petition, pp. 14-16) which are contrary to *Cohen* on the scope of § 1985(3) were not rendered precipitously. The courts there were certainly aware of the constitutional limitations of

§ 1985(3). At least ten courts have squarely held that the statute could reach private conspiracies—four relying specifically on Section 5 of the Fourteenth Amendment.

In short, when the respondents argue that *Price* and *Guest* are controlling on the scope of § 1985(3) under the Fourteenth Amendment, they overlook the facts that this Court did not pass on the point in *Price* and *Guest*, but instead held this not to be the law in *Katzenbach* and later cases. Thus, in making this argument based on *Price* and *Guest*, and in urging that *Cohen* was correctly decided on those cases, respondents are conceding error in *Cohen*.

PETITIONER HAS NO EFFECTIVE ALTERNATIVE REMEDY

In contrast to our demonstration in the Petition (pp. 16-21) that alternative civil rights remedies are inutile, respondents make the unsupported assertion that petitioner has state court and federal agency remedies.

The record speaks for itself. Petitioner filed charges with HEW on or about August 31, 1971. On January 9, 1974, HEW made its finding of reasonable cause. It is now March 1976, and nothing further has happened.

And all the while, respondents are currently enjoying well over $20.8 million per year in federal contracts[3], and an unknown[4] but certainly extensive amount of state

[3] CHEMICAL WEEK, May 7, 1975, p. 51.

[4] "If Cohen is without sufficient facts to warrant specific pleadings in this case, she should not have brought the Complaint in the first place." Brief for Defendants-Appellees, in the United States Court of Appeals for the Seventh Circuit at p. 20.

aid and contracts—and brazenly asserting that the courts are powerless as it is immaterial "whether Plaintiff is an incompetent, paranoiac or a beleaguered victim of sexism."[5]

CONCLUSION

The Court should grant the writ.

Respectfully submitted,

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[5] Defendants' Reply Memorandum in Support of Their Motion to Dismiss, in the United States District Court for the Northern District of Illinois at p. 2.